

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TAHON DWAYNE JACKSON,

Defendant-Appellee.

UNPUBLISHED

July 9, 1999

No. 213110

Kent Circuit Court

LC No. 97-009361 FC

Before: Hoekstra, P. J., and Saad and R. B. Burns*, JJ.

PER CURIAM.

Defendant was bound over on the charges of second-degree murder, MCL 750.317; MSA 28.549, and felonious assault, MCL 750.82; MSA 28.277. The trial court granted defendant's motion to quash and dismissed the charge of second degree murder on the ground that there was insufficient evidence to bind over defendant for trial. The court substituted the offense of manslaughter, MCL 750.321; MSA 28.553, and remanded the case to the Juvenile Division of the Probate Court. The prosecutor appealed. This matter comes to us by Supreme Court remand for consideration as on leave granted. 458 Mich 863 (1998). We reverse.

This case arises from the shooting death of Lanell Griggs. Arlisha James was the prosecution's principal witness. On August 17, 1997, James and the victim went to Waleed Clark's house in Grand Rapids where two other young men were present. Defendant arrived shortly thereafter. Clark produced a gun and the young men began playing with it and pulling the trigger. At some point, a shell was put into the gun. James had seen a bullet in Clark's possession. She surmised that he loaded the gun while she was sitting on the couch, although she admitted she did not see it being loaded. She believed that defendant was sitting next to her on the couch. Defendant took the gun outside, saying, "I'm fittin' to shoot it outside." Another of the young men, Jason Cummings, told him not to fire the gun outside because of police patrols in the area. Shortly thereafter, the group went across the street to Cummings' grandmother's house. Defendant, who had kept the gun, pointed it, first at James, then at Griggs. When he pointed the gun at Griggs, he pulled the trigger, and the gun discharged. Griggs was

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

shot in the head. Defendant looked shocked after Griggs was shot. He told police that he said, “Who loaded the gun?” James said she did not hear defendant make this statement.

Plaintiff contends that the circuit court erred in finding an abuse of discretion in binding defendant over for trial. We agree. A district court must bind a defendant over for trial when the prosecutor presents competent evidence constituting probable cause to believe that (1) a felony was committed and (2) the defendant committed that felony. MCL 766.13; MSA 28.913; MCR 6.110(E); *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). Probable cause requires a reasonable belief that the evidence presented during the preliminary examination is consistent with the defendant’s guilt. *People v Justice (After Remand)*, 454 Mich 334, 343-344; 562 NW2d 652 (1997). Circumstantial evidence, coupled with inferences arising from the evidence, is sufficient to establish probable cause. *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997). The determination that sufficient probable cause exists will not be disturbed unless the determination is wholly unjustified by the record. *Northey, supra*, 574. In order to introduce sufficient evidence to bind defendant over for trial on second-degree murder, MCL 750.317; MSA 28.549, the prosecution had to present evidence that defendant caused the death of Griggs and that the killing was done with malice and without legal justification or excuse. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998); *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996). Malice is the intent to kill, to cause great bodily harm, or to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or serious bodily harm. *Goecke, supra*, 464; *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980).

Upon de novo review, *Northey, supra*, 574, we find that credible evidence was presented at the preliminary examination to support the conclusion that defendant knew the gun was loaded. His statement, “I’m fittin’ to shoot it outside,” manifested a knowledge that he could not fire the gun inside because it was loaded. If defendant had believed the gun was not loaded, he could have pulled the trigger while inside the house. *People v Kieronski*, 214 Mich App 222, 229; 542 NW2d 339 (1995). The contradictions in James’ testimony create questions of fact and credibility, which should be left to the trier of fact. *Id.*; *Terry, supra*, 451.

Defendant argues that, in determining whether he knew the gun was loaded, this Court should employ the “subjective” test articulated in *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984), rather than the “objective” test articulated in *Aaron, supra*, 728. We find it unnecessary to determine which test should apply, since there was sufficient evidence to bind defendant over under either test. The district court did not abuse its discretion in binding defendant over for trial. The circuit court erred in deciding otherwise. *Northey, supra*.

Reversed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ Robert B. Burns